1949

Frank Sant v. Orlando Jesse Miller : Petition for Rehearing

Utah Supreme Court

Harvey A. Sjostrom; Attorney for Appellant;

7277

IN THE SUPREME COURT OF THE STATE OF UTAH

- - - - - - - - - - - - - - - - - - - -

In the Matter of

FRANK SANT,

Plaintiff and Appellant,

-vs-

ORLANDO JESSE MILLER,

Defendant and Respondent.

- - - - - - - -

PETITION FOR REHEARING

- - - - - - - -

Harvey A. Sjostrom
Attorney for Appellant.

SUBJECT INDEX

- -

INDEX OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK SANT,

Plaintiff and Appellant,

-vs-

ORLANDO JESSE MILLER,

Defendant and Respondent.

TO THE HONORABLE SUPREME COURT OF THE STATE OF UTAH:

Comes now Frank Sant, appellant above named, and respectfully represents in its decision rendered by Justice Latimer in the above entitled cause, the court erred in the following particulars:

I.

The decision as rendered assumes facts which do not actually exist and which are not a part of the record in case at bar.

II.

The decision as rendered fails to take

cognizance of facts in the record and to which facts appellant is entitled to have assumed in his favor where verdict is directed against him.

III.

The decision as rendered lays down untenable law where the issue of contributory negligence is involved.

IV.

The decision as rendered is contradictory in itself as to the law applicable to the case.

WHEREFORE, Petitioner prays that a re-hearing of said cause be granted.

Harvey A. Sjostrom

Attorney for Plaintiff and Appellant.

I, Harvey A. Sjostrom, attorney for appellant and petitioner above named, do hereby certify that in my opinion there is good reason to believe that the decision and opinion of the above entitled court is erroneous in the particulars set forth in the foregoing petition and that

the cause therein referred to ought to be re-examined.

Respectfully,

Harvey A. Sjostrom

Attorney for Plaintiff and Appellant.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

The assignments of error will be discussed together because they are so inter-woven and involved one with another in their bearing on the opinion of the Court in the said cause.

In the first part of THE 1ST full paragraph on page number two of the holding, Justice Latimer, recites that appellant "looked to the north, saw the car coming, stopped for from 3 to 5 seconds in the main travelled portion of the street and during this time, failed to watch the movement of cars from the north." From this language it is evident that the writer assumes that appellant merely glanced at the cars then failed to continue to look any more for a space of from 3 to 5 seconds. Such

assumption is entirely at variance with the record for no where does it appear that he discontinued looking at the cars until he turned his head in a southwesterly direction and it was just as he turned his head that he was struck.

To substantiate that he did more than glance we quote from defendant's brief on page 9 thereof, where defendant quotes appellant as follows: "my wife, I had my arm thru hers and I saw cars coming from the north and hesitated or stopped just across the rails <u>to see what those cars were going to do.</u>" Certainly this language shows continued observance and deliberation by appellant up until he turned his attention in a southwesterly direction when he evidently concluded that there was no danger to himself and his wife in the situation. Up to that time he had no reason to believe nor did his wife believe that defendant would <u>suddenly</u> swerve to the left and run him down. That he

was alert is evidenced by that fact, "that he hesitated or stopped just across the rails to see what those cars were going to do." (tr. 125) Those cars too, it must be remembered, were more than "slightly" to the west of appellant as the writer of the opinion puts it, but were nearer the west curb which would be at least 10 feet west of him. (appellant) (tr. 187)

There are also these further facts as shown by the record: The light at the intersection at 1st South and Main was either yellow or red (tr. 126) pointing to the north and the car ahead of respondent's was slowing up evidently preparatory to stopping (tr. 259, 260) for east and west bound traffic. Then too, the cross-walk was only a mere 79 feet (tr. 219) from where the accident took place so appellant would have a right to assume that respondent would be slowing up preparatory to stopping. These facts together with the undisputed fact that an object the size of a man could be seen a block away was certainly reason sufficient to

make any reasonable man think that everything was O.K. Even though Mrs. Sant was looking at the very time respondent swerved and immediately stepped back and cried out, together with the fact that her coat was jerked from her person by defendant's car indicates how fast she stepped back and is strong added proof that respondent was well within 30 feet of plaintiff when he suddenly swerved and that she was a very much surprised person. (tr. 258) In the light of these facts and others which will be presently pointed out can we say that the plaintiff was negligent ?

The law states plaintiff should not have crossed where he did, yet the law further states in 57-7-144 (a) "Notwithstanding the foregoing provisions of this act (which previous has to do with the respective right-of-ways of drivers and pedestrians 57-7-141, 57-7-142, 57-7-143) every driver of a vehicle shall exercise due care to avoid colliding with any pedestrians upon any roadway and shall give

warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any incapacitated person upon a roadway" and states (sub-sec. C. of 57-7-113) "the driver of every vehicle shall, consistant with the requirements of subdivision (a) of this section, drive at an appropriate reduced speed when approaching and crossing an intersection or roadway crossing ---- and when special hazard exists with respect to pedestrians or other traffic or by reasons of weather or highway conditions." And as stated in Dalley vs. Midwestern Dairy Products Co. (80 Ut. 331, 336, 15 P. (2nd) 309) and affirmed in many other cases by this Court it is negligence as a matter of law to drive a car upon a public highway at such rate of speed that a car cannot be stopped within a distance at which the driver is able to see objects upon the highway in front of him.

We do not call the courts attention to these sections for the mere purpose of show-

ing the negligence of the defendant, but for the purpose of showing that plaintiff had a right to expect from defendant a reasonable lookout and plaintiff cannot be charged with negligence because he failed to anticipate defendant's failure to so do as will hereinafter be more fully pointed out and cases cited in support thereof.

Neither the ordinances of Logan City or the Statutes of the State of Utah prohibiting crossing between intersections can be construed as to sanction a relaxation of vigilence on the part of drivers of automobiles upon public streets as that would run counter to its evident intent, and if this is so, plaintiff had every reason to rely on the thought that defendant had seen him when he turned his head. In the absence of discerning or being bound to anticipate that defendant probably would attempt to pass, he also had a right to rely on this: that defendant having made no indication up to within about 30 feet of him

that he would pass the other car that he did not intend to pass and particularly so in a sudden and erratic way that he did. Then too there was the added reason that the light was yellow or red, another car moving slowly evidently preparatory to stopping for said light and that an object could be seen for a block away and if an object could be seen for a block away did he have any reason to believe that defendant had not seen him under sueh a condition together with the fact that headlights were fully on, on defendant's car.

Plaintiff, as a reasonable man, had every reason to believe that defendant was keeping a reasonable lookout and that he and his wife had been seen. Can this court say that under the facts and circumstances of this case that plaintiff, acting as a reasonable man, had no reasonable grounds, so to assume ? We believe NOT, and if we are right in this can it be said

that though this is true he was reasonably bound to anticipate the negligence or recklessness of the defendant in suddenly swerving and running him down ? We believe NOT, for it is said in the case of Dobson - Peacock vs. Curtis, 186 S.E. 13, 166 Va. 550 that "Pedestrian crossing street between intersections, although charged with knowledge that automobile which she had seen was approaching, was not charged with knowledge that motorist was not keeping a proper lookout and had right to assume that motorist proceeding along street would keep reasonable lookout."

In the case of Kennelly vs. Waropajak 109 Atlantic 608, the driver suddenly, as in the instant case, swerved to miss a hole in the road and the court here also stated that pedestrian was not bound to anticipate negligence or swerving of car. To the same effect is Safron vs. Am. Tee Co., 66 Pa. Super 419.

" A mere error of judgment is not negligence

if an ordinarily prudent man would have made the same error". So reads 45 C.J. 953, citing William Est. Co. vs. Nevada Wonder Co. 196 P. 844. And to establish contributory negligence as a matter of law, the act relied on must be distinct, prominent and decisive, and one about which ordinary minds cannot differ". Gudelsly vs. Bone 23 A. (2nd) 694.

While it may be true in certain cases that a person who is himself breaking a law which was enacted for his safety may not rely as a matter of law upon the presumption that another will not breach his statutory or other duties he may as he did in this case rely upon the actual surrounding circumstance or factual situation that his safety would not be disturbed by the sudden erratic swerving of the defendant. To this effect is McPherson vs. Walling et al, 209 Pac. 209, and above referred to cases.

The writer further states that the plaintiff knew he was standing in a "position of danger"

that it would be difficult for motorist to see him and his wife. The facts of this case do not warrant such a statement. He was neither in a "position of danger" which has heretofore been shown, for he was at least 10 feet east of a car that was not more than 30 feet to the north of him when he turned his head, nor is there any ground for saying that a motorist would have difficulty in seeing him for an object could be seen for a block, and added to this there was the lights of the oncoming cars. (See plaintiff's reply brief as to "position of danger."

Here was deliberation on part of the plaintiff for as pointed out he testified "my wife, I had my arm thru hers and I saw cars coming from the north and hesitated or stopped just across the rails to see what those cars were going to do." This being the testimony, was he guilty of negligence when he momentarily took his eyes off the defendant's car which was then not more than 30 feet to the north

and not less than 10 feet to the west of him and this too when the light at the intersection was yellow or red, an object could be seen a block away, the lights of the cars were fully burning, the car ahead of defendant was moving slow evidently preparatory to stopping for light; Mrs. Sant saw nothing in the situation which excited her in the least up to the time of the sudden swerve of defendant's car.

The opinion states that Mrs. Sant was reasonably alert and therefore escaped injury. The fact is that Mr. Sant was equally alert if not more so because he testified that he "stopped or hesitated to see what those cars were going to do" showing, without question, that he was alert for as the cars came along to the west of him he had in mind what those cars might do in regard to passing, but decided that there was no probability in any car so doing and saw no probability of danger to himself or wife evidently was concerned about the parties ahead as to their safety as the cars were further to the

west "closer to the curb". Mrs. Sant testified as follows: Q. "Do you know which way Mr. Sant was looking just before the collision occurred ?" A. "No, Sir, I do not, I was just standing there just casually looking down the street as we were stopped waiting for the cars." (tr. 270 and pp. 7 respondent's brief) (There used to be a cross-walk about where they crossed. Tr. 271) This is certainly very strong proof in showing that there was no question which arose in her mind "as to what those cars were going to do" as that question, if it arose, had been settled and put her at ease and it was only because she happened to be looking at the cars at the time of the defendant's sudden swerve that saved her, not that her alertness was above that of Mr. Sant's for the factual situation had put her mind completely at rest on what those cars were going to do - she certainly expected no erratic sudden swerve and passing and neither would any other prudent person including appellant under the circumstances Inasmuch as Mrs. Sant only

escaped by a "hair's breath" can it be said that if Mr. Sant had also been looking and saw the sudden swerve at the time his wife did that he would have as a matter of fact escaped injury ? We believe not.

Here, if anything, was an excusable mistake of judgment that any prudent person might make and it is said in the case in volume 13 A.(2nd) 121, 124, "Only when the danger is so obvious that an ordinary prudent person would regard it as a hazard, and therefore avoid it, is a person taking a chance guilty of contributory negligence as a matter of law." "Whether a mistake in judgment by a pedestrian when crossing a street, as to speed and danger of an approaching vehicle, constitutes negligence is a question of the jury," so states the Court in Kirk vs. Los Angeles. R. Corp. 161 P. (2) 673, 164. A.L.R. p 3 note 11.

The opinion conceedes and concludes that a pedestrian crossing between intersections, even in contravention of a statute, need not anticipate that a motorist will suddenly change his

course and run him down, but states that such rule of law does not control the factual situation, "Because of the violation of the quoted ordinance and statute, appellant was on the street at a prohibited place, and under these circumstances, he was required to constantly observe the movement of traffic from the direction it should legally travel." This is not and cannot be the law and is in direct contradiction of the conceded law by the learned Justice and cases heretofore cited. Neither counsel or the Justice cite any cases in support of such a rule of law and we venture to say that no case can be found. If the plaintiff did not have to anticipate the sudden change of course by the motorist as a matter of law what was there in the factual situation which changed that up to and at the instant prior to appellant looking in a southwesterly direction for his friends and observing at the same time the signal light as being either red or yellow. There was absolutely nothing to put a person of prudence on notice

of the sudden change or swerve to come, so the case comes squarely under the conceded law, - that appellant did not have to anticipate said swerve as a matter of law and certainly not from the facts surrounding the accident. The Justice further observes in the first full paragraph of the last page, that: "He was required to anticipate that vehicles move at different rates of speed; that the slower moving automobiles are required to drive on the right-hand side of their appropriate portion of the highway and faster moving vehicles pass to their left; that the faster moving vehicles may not continue in a direct line but may turn out from a straight formation to go around the slower moving car, and that such movements may be made by reasonably safe drivers if they do not know, or have no reason to be charged with knowledge that pedestrians will be endangered by such movements. Particularly is such the case when the driver at all times remains on his proper side of the highway.

Can it not be said that under the facts of this case that the defendant is charged with having seen the plaintiff at least 150 feet from the place of impact and can it not be said also that plaintiff had every reason to believe under the facts of this case as heretofore and as will immediately be pointed out that defendant had seen plaintiff and therefore plaintiff was in no danger.

In the last paragraph on page 2 of the opinion Justice Latimer states that because plaintiff stood still would not necessarily clear him of negligence. No where in the brief of respondent have I seen a claim that just as soon as plaintiff saw the cars coming from the north he should have stepped back. Nor can such a statement be properly made for he was 10 feet, at least, to the east of the oncoming cars.

In the second paragraph of page 3 of the opinion it is stated that, "He knew he was leaving a place of safety to travel a hazard-

ous course across the road. It was late at night, dark and cloudy and the streets were wet. It was midwinter and the parties were dressed in dull colors. Appellant was wearing a brown overcoat and his wife a gray coat thrown over her shoulders." The answer to this is: They observed the street was clear to the south when they started across (tr. 124) and when they got to the middle of the street they observed 2 or three cars coming from the north on the west side of street. (tr. 124-125) An object such as a man could be seen a block away (tr. 217 - 231) and defendant's headlights were fully burning (tr. 306); lights were good and would show an object 2 or 3 hundred feet ahead. (tr. 306 - 307) This being so was the plaintiff unwarranted as a reasonable man in thinking he and his wife had been seen by defendant when defendant was within at least 15 or 20 rods of them and certainly had been seen just prior to defendant turning his head and that defendant would not be negligent. Then too

would not the gray coat of the wife show up very well at the distance mentioned or for that matter any color. The opinion further states, "Assuming he had been standing there some 4 or 5 seconds he was not watching traffic approaching from the north which would be the direction from which he knew traffic was coming and from which it legally must come." The answer to such a statement is this: That he was looking to the north for he testified: "My wife, I had my arm thru hers. I saw cars coming from the north and hesitated or stopped just across the rails to see what those cars were going to do." (tr. 125) "While standing there for those cars to advance, I looked to my left to see where our companions were. Now anyone can tell you about as well from there as I can. That's where I was - just as I turned and looked is where I was struck." Does not this language show that he was attentive to the cars coming from the north and that he had come to the conclusion that he had been seen and from the

position of the cars that there would be no passing or negligence on part of defendant.

It has never been my practice to seek private audience with any member of this Court concerning any case for which I was attorney, but that does not mean that I do not feel equally as sincere as those who gain these audiences.

As attorney for the appellant in this cause I would feel neglectfull, indeed, if I did not make this petition for rehearing feeling as I do concerning the facts and the law applicable thereto. Equally guilty of neglect would I feel, to this Court, if I failed to aid it in its search for and administration of justice in this cause.

In this matter I believe I have stated the evidence correctly as well as the law, and now there is only one thing more I can do and that is to hope that this Court is not so overcrowded with other work as not to be able to give full and adequate time to the consideration of this

petition for a re-examination of this cause so as to assure justice to all parties concerned. I believe, most sincerely, that after such re-examination has been made this Court will be able to say that the question of contributory negligence was for the jury and not one for the Court. I hope for such a ruling. Perhaps I am in error. It is for your Honors to decide. Whatever that decision is we must abide by.

Respectfully submitted,

Harvey A. Sjostrom

Attorney for Plaintiff and Appellant.

Over - please

In the case of O'Neill vs. Ewert 189 App. Div. 221, 178 N.Y. Supp. 506, 79 A.L.R. page 1086, other cases annotated commencing on page 1076 same volume, the plaintiff looked and saw the automobile approaching 60 feet away. If the automobile had continued in its course the plaintiff would have had to proceed but 5 or 6 feet to be beyond danger of being struck. The court held that his failure to look a second time under such circumstances was not contributory negligence as a matter of law. The court also said: "The law does not put upon a pedestrian the burden of looking any particular number of times, nor does it say when he must look. He is not bound, as a matter of law, to look at a particular time, and, as matter of law, he is not called upon to stop to allow the passing of an approaching vehicle."